

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Re: Appeal to the Board of Patent Appeals and Interferences

Appellants	Kaylor et al.	)	Examiner:	Lyle Alexander
)		
Serial Number:	10/035,013	)	Group Art Unit:	1797
)		
Filed:	December 24, 2001	)	Customer Number:	22827
)		
Confirmation No:	1072	)	Deposit Account:	04-1403
)		
Title:	Reading Device, Method, and System for Conducting Lateral Flow Assays	)	Attorney Docket No.	KCX-461 (15790)
)		

1. ☐ **NOTICE OF APPEAL:** Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated _____ of the Examiner twice/finally rejecting claims _____.
2. ☐ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy).
3. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. ☒ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. ☐ "Small entity" verified statement filed: [] herewith [] previously.

6. **FEE CALCULATION:**

Fees

If box 1 above is X'd enter \$ 540.00	\$ <u>0.00</u>
If box 2 above is X'd enter \$ 540.00	\$ <u>0.00</u>
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PETITION is hereby made to extend the original due date of March 3, 2009, hereby made for an extension to cover the date this response is filed for which the requisite fee is enclosed (1 month \$130; 2 months \$490; 3 months \$1,110; 4 months \$1,730, 5 months \$2,350) \$ 0.00

SUBTOTAL: \$ 0.00

Less any previous extension fee paid since above original due date. - \$ 0.00

Less any previous fee paid for prior Notice of Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ 0.00

Less any previous fee paid for submitting Brief on prior Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ 0.00

SUBTOTAL: \$ 0.00

If "small entity" verified statement filed ☐ previously,
☐ herewith, enter one-half (1/2) of subtotal and subtract - \$ 0.00

TOTAL FEE ENCLOSED: \$ 0.00

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- ☐ Charge fee to our Deposit Account/Order Nos. in the heading hereof (for which purpose one additional copy of this sheet is attached)
- ☒ Charge to credit card (attach Credit Card Payment Form – PTO 2038)
- ☐ Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

The Commissioner is hereby authorized to charge any fee specifically authorized hereafter, or any fees in addition to the fee(s) filed, or asserted to be filed, or which should have been filed herewith or concerning any paper filed hereafter, and which may be required under Rules 16-18 (deficiency only) now or hereafter relative to this application and the resulting official document under Rule 20, or credit any overpayment, to our Account No. shown in the heading hereof. This statement does not authorize charge of the issue fee in this case.

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Date: March 3, 2009

I hereby certify that this correspondence and all attachments and any fee(s) are being electronically transmitted via the internet to the U.S. Patent and Trademark Office using the Electronic Patent Filing System on March 3, 2009.

Sandra S. Perkins

(Typed or printed name of person transmitting documents)



(Signature of person transmitting documents)

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Serial No: 10/035,013)	Art Unit: 1797
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Filed: December 24, 2001)	Confirmation No: 1072
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Title: Reading Device, Method, and)	Deposit Account No: 04-1403
System for Conducting Lateral)	
Flow Assays	)	Customer No: 22827

Honorable Commissioner for Patents
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

REPLY BRIEF

Honorable Commissioner:

Appellants submit the following brief in reply to the Examiner's Answer in accordance with 37 C.F.R. § 41.41. Section headings utilized in the Reply correspond to those used in the Appellants' initial brief.

3. STATUS OF CLAIMS

Claims 62-64, 66, 69-72, and 74-80, including independent claim 62, were finally rejected under 35 U.S.C. § 102(b) in the Final Office Action of April 18, 2008. Claim 73 was finally rejected under 35 U.S.C. § 103(a) in the Examiner's Answer of January 3, 2009. Claims 62-64, 66, and 69-80 are hereby appealed.

6. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

In the Final Office Action, 62-64, 66, 69-72, and 74-80 were rejected under 35 U.S.C. § 102(b) as being unpatentable over EP 0308770 or U.S. Patent No. 4,833,088,

both to DeSimone, et al.¹

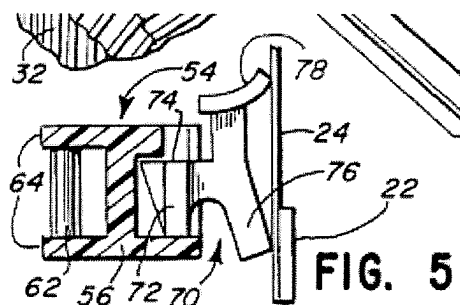
In the Examiner's Answer, claim 73 was also rejected under 35 U.S.C. § 103(a) as being obvious over EP 0308770 or U.S. Patent No. 4,833,088, both to DeSimone, et al.

7. ARGUMENT

I. Independent Claim 62 is Not Anticipated by DeSimone, et al. Under 35 U.S.C. § 102(b)

A. DeSimone, et al. Does Not Disclose the Claimed "Absorption Pad"

The Examiner's Answer argues that the language of claim 62 is "sufficiently broad" to read on the embodiment shown in Fig. 5 of DeSimone, et al., which is reproduced below.



More specifically, the Examiner asserts that the light shield 78 is on the underside of the strip 24 and thus properly read on the present claims. Respectfully, however, claim 62 does not just require that the adsorption pad is on the underside of the membrane strip. Claim 62 requires that the adsorption pad *cover an area under which the membrane strip is impacted by electromagnetic radiation*. When viewed in its entirety, this limitation is not taught by DeSimone, et al.

¹ EP0308770 is the European counterpart to U.S. Patent No. 4,833,088 to DeSimone, et al. Thus, for the sake of convenience and to simplify the issues on appeal, the present brief makes reference to the U.S. patent.

B. DeSimone, et al. Does Not Disclose the “Aperture” of the Claimed “Light Barrier Structure”

According to the Examiner's Answer, the claimed “aperture” is satisfied by aperture 176 of DeSimone, et al. (Fig. 10) because it encompasses “a portion” of the detection zone. Even if true, this is not what is required by claim 62. Instead, claim 62 requires that the *aperture has a size that approximates the size of the detection zone*. One of ordinary skill in the art would readily understand that an aperture that simply encompasses a portion of a detection zone does not mean that the aperture has a size that approximates the size of the detection zone.

II. Dependent Claim 71 is Not Anticipated by DeSimone, et al. Under 35 U.S.C. § 102(b)

With respect to the limitation of claim 71 requiring that a capture reagent (e.g., antibody) is immobilized within the detection zone that is configured to directly or indirectly bind to the analyte, the Examiner's Answer cites the following sentence of DeSimone, et al.:

Quantitative measuring instruments such as reflectance photometers are used to measure the degree of color developed on a reagent strip by the glucose contained in a drop of whole blood.

(Col. 4, ll. 64-67). Despite the assertion of the Examiner, however, this only mentions that a color change may be achieved. It does not at all disclose a capture reagent immobilized within the detection zone that is configured to directly or indirectly bind to the analyte. In fact, other methods could be employed to achieve the color change that do not involve binding to the analyte, such as a dye.

III. Dependent Claim 72 is Not Anticipated by DeSimone, et al. Under 35 U.S.C. § 102(b)

The Examiner's Answer indicates that aperture 176 of DeSimone, et al. (Fig. 10) is "elongated." Plainly, however, the aperture has a square shape. No reasonable interpretation of the term "elongated", when viewed in the context of the specification and claim language, could conceivably read on such a square aperture.

IV. Dependent Claim 73 is Not Obvious in view of DeSimone, et al. Under 35 U.S.C. § 103(a)

Appellants submit that for at least the reasons indicated above relating to corresponding independent claim 62, dependent claim 73 patentably defines over DeSimone, et al.

V. Dependent Claims 79 and 80 are Not Anticipated by DeSimone, et al. Under 35 U.S.C. § 102(b)

The Examiner's Answer asserts that the reagent pad 22 of DeSimone, et al. serves as both the sample pad (claim 79) and wicking pad (claim 80). Respectfully, this is completely contrary to the well understood meaning of these terms. As explained in the present application, for example, the wicking pad "pulls" the liquid containing the analyte along the membrane from one end to another end and the sample pad is the place where the sample is applied. Even assuming *arguendo* that the reagent pad 22 of DeSimone, et al. could be considered a "wicking pad", it cannot possibly be construed as a sample pad.

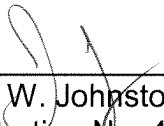
In conclusion, it is respectfully submitted that the claims are patentably distinct over the prior art of record and that the present application is in complete condition for allowance. As such, Appellants respectfully request issuance of the patent.

Respectfully submitted,

DORITY & MANNING,
ATTORNEYS AT LAW, P.A.

3/3/09

Date



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